No. 78-1117

In the Supreme Court of the United States

OCTOBER TERM, 1978

DONALD GILBERT SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 584 F. 2d 759.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1978. A petition for rehearing was denied on December 15, 1978 (Pet. App. 1b). The petition for a writ of certiorari was filed on January 15, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process when, after his plea of guilty to one count of a six count indictment was vacated on his motion because the district court had violated Fed. R. Crim. P. 11 in accepting his plea, he was tried and convicted on the six counts charged in the original indictment and received a more severe sentence.

2. Whether petitioner was prejudiced by an unrequested instruction on entrapment.

STATEMENT

On September 26, 1974, petitioner was indicted on six counts charging possession of controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that crime, in violation of 21 U.S.C. 846. On December 9, 1974, pursuant to a plea bargain whereby Counts I-V would be dismissed, petitioner entered a plea of guilty to Count VI of the indictment. He was sentenced to four years' imprisonment followed by three years' special parole and was fined $10,000. Petitioner thereafter challenged his conviction on the ground that the trial judge violated Fed. R. Crim. P. 11 by accepting his guilty plea without advising him of the mandatory special parole term. The district court denied the motion, but the court of appeals reversed and remanded with instructions to allow petitioner to withdraw his plea (Pet. App. 1f-2f). *United States* v. *Smith*, No. 77-1560 (6th Cir. Dec. 20, 1976). The government then dismissed the count of the indictment to which petitioner had pleaded guilty and obtained a new six count indictment charging petitioner with the identical offenses contained in the first indictment. Petitioner moved to dismiss Counts I-V of the new indictment, and the district court denied the motion.

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on all six counts. He was sentenced to three years' imprisonment and two years' special parole on Count I, two years' imprisonment and two years' special parole on each of Counts II-V, and four years' imprisonment, two years' special parole, and a fine of $10,000 on Count VI, all sentences to be served consecutively. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial showed that petitioner supplied phencycladine (PCP) and lysergic acid diethylamide (LSD) to Kathy Carr. Carr gave the substances to Karl Lange, who in turn made several sales of the drugs to Agent James Porten of the Drug Enforcement Administration.

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the government's decision to reinstate the six counts of the original indictment after he had successfully attacked his guilty plea on Count VI resulted from prosecutorial vindictiveness and therefore violated the due process principles of *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). But this Court "has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see *Colten* v. *Kentucky*, 407 U.S. 104; *Chaffin* v. *Stynchcombe*, 412 U.S. 17, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Accordingly, petitioner would be entitled to relief on this claim only if the government's action "pose[d] a realistic likelihood of 'vindictiveness.' " *Blackledge* v. *Perry*, *supra*, 417 U.S. at 27.

Here, as the district court expressly found, there is no likelihood of vindictiveness because, unlike in *Perry*, the government did not file new or more serious charges against petitioner after he had successfully overturned his conviction. It merely reinstated the charges that had been dismissed solely as part of the plea bargain—a bargain that petitioner breached by withdrawing his guilty plea on Count VI.[1] "There is no appearance of retaliation when a

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[1]Following the court of appeals' vacation of his conviction on Count VI, petitioner did not offer to plead guilty again pursuant to

defendant is placed in the same position as he was in before he accepted the plea bargain." *United States* v. *Anderson,* 514 F. 2d 583, 588 (7th Cir. 1975). Accord, *Hardwick* v. *Doolittle,* 558 F. 2d 292, 301 & n.8 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978); *United States* v. *Johnson,* 537 F. 2d 1170, 1174-1175 (4th Cir. 1976); *United States* v. *Williams,* 534 F. 2d 119, 122-123 (8th Cir.), cert. denied, 429 U.S. 894 (1976). See also *Santobello* v. *New York,* 404 U.S. 257, 263 n.2 (1971) (if guilty plea to one count entered pursuant to plea bargain is withdrawn, defendant "will, of course, plead anew to the original charge on two felony counts").

By the same token, petitioner was not deprived of due process because he received a heavier sentence after his conviction on the six count indictment than he received after his guilty plea to one count. As the Court stated in *North Carolina* v. *Pearce, supra,* 395 U.S. at 723, "[a] trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams* v. *New York,* 337 U.S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself [or] from a new presentence investigation * * *." In this case, there was significant new information before the sentencing judge after trial that was not available at the time petitioner pleaded guilty. For one thing, petitioner had been convicted of five additional serious offenses.[2] These

the earlier plea bargain but rather insisted on a trial on that count alone. Hence, petitioner attempted to obtain the benefit of the plea bargain—dismissal of Counts I to V-while retaining the possibility of an acquittal on the one count to which he had promised to enter a guilty plea.

[2]The trial judge observed at the sentencing proceeding that he had not considered the five offenses dismissed as part of the plea bargain in assessing petitioner's first sentence following the guilty plea (Sent. Tr. 16).

convictions, and the evidence produced at trial in support of them, are precisely the kind of identifiable subsequent information that can support an increased sentence under *Pearce.*[3] Furthermore, the trial judge indicated that the increased sentences were also based on petitioner's admissions, introduced at trial, that petitioner was "the king pin of this drug operation which included a number of other individuals and underlings" (Sent. Tr. 17).[4]

Finally, petitioner claims (Pet. 10-13) that he is entitled to "specific performance" of the plea bargain he struck with the government on the first indictment.[5] This claim appears to be based on a misunderstanding of the court of appeals' order vacating his guilty plea (Pet. App. 1f-2f). That court held only that petitioner's conviction should be set aside because the district court had failed to comply fully with Rule 11 when it accepted his plea, not because the prosecutor had breached any promise made during the plea negotiations. Hence, this case is distinguishable from *Santobello* v. *New York,* 404 U.S. 257 (1971), upon which petitioner principally relies, where the prosecutor violated the plea bargain.[6]

[3]Petitioner did not receive a greater sentence on Count VI after being found guilty at trial than he received after he had pleaded guilty to that count.

[4]The transcript of the recorded conversation between petitioner and Carr (Gov. Ex. 20, at 8) shows that petitioner stated: "You see, your people, you're above them, you know, you supply them, so you're their big shot. I might be your big shot, but you're their big shot. * * * You know, you're not out on the street, pushing, you got your street people, okay. So you're just a little bit above them. You have a little more responsibility than they do * * *."

[5]Petitioner alleges (Pet. 3) that he "was assured by both the United States Attorney and the District Court that the maximum sentences to which Petitioner would be subjected would be five years." As noted above, petitioner was sentenced after his guilty plea to four years' imprisonment followed by three years' special parole.

[6]Petitioner's claim that the government breached the plea agreement was not presented to the courts below. See *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 n.2 (1970).

2. Petitioner contends (Pet. 14-19) that the district court erred by giving the jury an admittedly correct but unrequested instruction on entrapment (Pet. App. 1e-2e). Although the court gave petitioner notice that the instruction would be given (Tr. 913), petitioner did not object until after the judge had charged the jury, and, even then, he proposed no curative instructions (Tr. 971-972). In any event, even if it is assumed that petitioner has preserved his claim of error with regard to the instruction, any error was harmless. The jury was clearly instructed that petitioner denied every material aspect of the charges against him (Tr. 934). See *United States* v. *McCord*, 509 F. 2d 891, 896 (7th Cir.), cert. denied, 423 U.S. 833 (1975). Hence, the entrapment instruction merely gave petitioner the benefit of an additional defense without requiring him to admit that he had engaged in unlawful activities. As the court of appeals observed (Pet. App. 8a), "[w]hen the entrapment instruction is considered as part of the Court's complete instructions, it is difficult to find prejudice to" petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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